

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

TAMEAKA H.,<sup>1</sup>

3:18-cv-00403-BR

Plaintiff,

OPINION AND ORDER

v.

Commissioner, Social Security  
Administration,

Defendant.

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Attorney for Plaintiff

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1 In the interest of privacy and pursuant to the recommendation of the Judicial Conference of the United States, this Opinion and Order uses only the first name and the initial of the last name of the nongovernmental party.

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**BROWN, Senior Judge.**

Plaintiff Tameaka H. seeks judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which she denied Plaintiff's application for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. This Court has jurisdiction to review the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

For the reasons that follow, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter for further proceedings.

**ADMINISTRATIVE HISTORY**

Plaintiff filed an application for SSI on November 2, 2012,

and alleged a disability onset date of January 1, 1999. Tr. 201-09.<sup>2</sup> Her application was denied initially and on reconsideration. An Administrative Law Judge (ALJ) held a hearing on December 15, 2014. Tr. 36-86. Plaintiff and a vocational expert (VE) testified at the hearing, and Plaintiff was represented by an attorney.

On December 10, 2015, the ALJ issued an opinion in which he noted Plaintiff had filed a previous application for SSI that had been denied and concluded there "is no apparent reason to reopen" that decision. Accordingly, the ALJ found the relevant period for this application is November 2, 2012, through the present. Tr. 14. Ultimately the ALJ found Plaintiff is not disabled and, therefore, is not entitled to benefits. Tr. 14-27.

On February 10, 2017, that decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review. Tr. 1-7. *See Sims v. Apfel*, 530 U.S. 103, 106-07 (2000).

### **BACKGROUND**

Plaintiff was born on December 15, 1984, and was 30 years

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<sup>2</sup> Citations to the official transcript of record filed by the Commissioner on September 8, 2017, are referred to as "Tr."

old at the time of the hearing. Tr. 201. Plaintiff has an eleventh-grade education. Tr. 20. Plaintiff does not have any past relevant work experience. Tr. 28.

Plaintiff alleges disability due to post-traumatic stress disorder (PTSD), severe depression, bi-polar disorder, and "slow learning." Tr. 87.

Except when noted, Plaintiff does not challenge the ALJ's summary of the medical evidence. After carefully reviewing the medical records, this Court adopts the ALJ's summary of the medical evidence. See Tr. 21-22, 24-27.

### **STANDARDS**

The initial burden of proof rests on the claimant to establish disability. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9<sup>th</sup> Cir. 2012). To meet this burden a claimant must demonstrate her inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The ALJ must develop the record when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence. *McLeod v. Astrue*, 640 F.3d 881, 885 (9<sup>th</sup> Cir. 2011) (quoting *Mayes v. Massanari*, 276 F.3d

453, 459-60 (9<sup>th</sup> Cir. 2001)).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). See also *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9<sup>th</sup> Cir. 2012). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Molina*, 674 F.3d. at 1110-11 (quoting *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9<sup>th</sup> Cir. 2009)). It is more than a mere scintilla [of evidence] but less than a preponderance. *Id.* (citing *Valentine*, 574 F.3d at 690).

The ALJ is responsible for determining credibility, resolving conflicts in the medical evidence, and resolving ambiguities. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9<sup>th</sup> Cir. 2009). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9<sup>th</sup> Cir. 2008). Even when the evidence is susceptible to more than one rational interpretation, the court must uphold the Commissioner's findings if they are supported by inferences reasonably drawn from the record. *Ludwig v. Astrue*, 681 F.3d 1047, 1051 (9<sup>th</sup> Cir. 2012). The court may not substitute its judgment for that of the

Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9<sup>th</sup> Cir. 2006).

### **DISABILITY ANALYSIS**

#### **I. The Regulatory Sequential Evaluation**

The Commissioner has developed a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. *Parra v. Astrue*, 481 F.3d 742, 746 (9<sup>th</sup> Cir. 2007). See also 20 C.F.R. § 416.920. Each step is potentially dispositive.

At Step One the claimant is not disabled if the Commissioner determines the claimant is engaged in substantial gainful activity. 20 C.F.R. § 416.920(b). See also *Keyser v. Comm'r of Soc. Sec.*, 648 F.3d 721, 724 (9<sup>th</sup> Cir. 2011).

At Step Two the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. 20 C.F.R. § 416.920(c). See also *Keyser*, 648 F.3d at 724.

At Step Three the claimant is disabled if the Commissioner determines the claimant's impairments meet or equal one of a number of listed impairments that the Commissioner acknowledges are so severe they preclude substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii). See also *Keyser*, 648 F.3d at 724.

The criteria for the listed impairments, known as Listings, are enumerated in 20 C.F.R. part 404, subpart P, appendix 1 (Listed Impairments).

If the Commissioner proceeds beyond Step Three, she must assess the claimant's Residual Functional Capacity (RFC). The claimant's RFC is an assessment of the sustained, work-related physical and mental activities the claimant can still do on a regular and continuing basis despite her limitations. 20 C.F.R. § 416.945(a). *See also* Social Security Ruling (SSR) 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent schedule." SSR 96-8p, at \*1. In other words, the Social Security Act does not require complete incapacity to be disabled. *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234-35 (9<sup>th</sup> Cir. 2011) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989)).

At Step Four the claimant is not disabled if the Commissioner determines the claimant retains the RFC to perform work she has done in the past. 20 C.F.R. § 416.920(a)(4)(iv). *See also Keyser*, 648 F.3d at 724.

If the Commissioner reaches Step Five, she must determine whether the claimant is able to do any other work that exists in the national economy. 20 C.F.R. § 416.920(a)(4)(v). *See also Keyser*, 648 F.3d at 724. Here the burden shifts to the

Commissioner to show a significant number of jobs exist in the national economy that the claimant can perform. *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9<sup>th</sup> Cir. 2010). The Commissioner may satisfy this burden through the testimony of a VE or by reference to the Medical-Vocational Guidelines set forth in the regulations at 20 C.F.R. part 404, subpart P, appendix 2. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 416.920(g)(1).

#### **ALJ'S FINDINGS**

At Step One the ALJ found Plaintiff has not engaged in substantial gainful activity since her November 2, 2012, application date. Tr. 16.

At Step Two the ALJ found Plaintiff has the severe impairments of hypothyroid, schizoaffective disorder, depression, history of alcohol abuse, history of marijuana abuse, PTSD, learning disorder, anxiety disorder, and history of amphetamine abuse. Tr. 16.

At Step Three the ALJ concluded Plaintiff's impairments do not meet or equal the criteria for any Listed Impairment from 20 C.F.R. part 404, subpart P, appendix 1. The ALJ found Plaintiff has the RFC to perform "a full range of work at all exertional levels that is low stress, meaning it consists of simple,



routing, repetitive tasks, that do not require more than superficial interaction, . . . more than occasional changes in the work setting or work processes, [or] . . . more than simple problem-solving.” Tr. 19.

At Step Four the ALJ found Plaintiff does not have any past relevant work. Tr. 28.

At Step Five the ALJ found Plaintiff could perform jobs that exist in significant numbers in the national economy. Tr. 26. Accordingly, the ALJ found Plaintiff is not disabled.

### **DISCUSSION**

Plaintiff contends the ALJ erred when he (1) improperly rejected Plaintiff’s testimony in part; (2) gave improper weight to the opinions of examining psychologists Cheryl Brischetto, Ph.D., and Rebekah Cline, Psy. D.; and (3) failed to include all of Plaintiff’s limitations in his hypothetical to the VE.

#### **I. The ALJ erred when he partially rejected Plaintiff’s testimony.**

Plaintiff alleges the ALJ erred by failing to provide clear and convincing reasons for partially rejecting Plaintiff’s testimony.

In *Cotton v. Bowen* the Ninth Circuit established two requirements for a claimant to present credible symptom

testimony: The claimant must produce objective medical evidence of an impairment or impairments, and she must show the impairment or combination of impairments could reasonably be expected to produce some degree of symptom. *Cotton*, 799 F.2d 1403 (9<sup>th</sup> Cir. 1986), *aff'd in Bunnell v. Sullivan*, 947 F.2d 341 (9<sup>th</sup> Cir. 1991). The claimant, however, need not produce objective medical evidence of the actual symptoms or their severity. *Smolen*, 80 F.3d at 1284.

If the claimant satisfies the above test and there is not any affirmative evidence of malingering, the ALJ can reject the claimant's testimony only if he provides clear and convincing reasons for doing so. *Parra v. Astrue*, 481 F.3d 742, 750 (9<sup>th</sup> Cir. 2007) (citing *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995)). General assertions that the claimant's testimony is not credible are insufficient. *Id.* The ALJ must identify "what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester*, 81 F.3d at 834).

At the hearing Plaintiff testified she is unable to work because her depression has "become worse." Tr. 52. Plaintiff also stated she sees and hears things every day such as "voices telling [her] to hurt [herself] or hurt other people or that people are out to get [her] or they're looking at [her] or following [her]." Tr. 52. Plaintiff testified she has anxiety

and panic attacks that are triggered by being in public or around a lot of people. The ALJ noted Plaintiff had been crying "since we started talking" to her at the hearing. Plaintiff explained she was crying because the hearing was causing her a lot of anxiety. Tr. 54. Plaintiff stated she does not have many friends other than her friend Roy "because I always think they are against me." Tr. 55. Plaintiff's relationship with her family is affected by her mental issues. For example, Plaintiff's aunt brought her to the hospital for psychiatric evaluation and treatment because Plaintiff kept saying her aunt "was out to get [her, and she] felt [her aunt] was trying to poison [her] food." Tr. 55. Plaintiff testified she does not cook using a stove or an oven because she "forgets a lot of the time." Tr. 54.

The ALJ found Plaintiff's "medically determinable impairments could reasonably be expected to cause some of the alleged symptoms to some degree," but Plaintiff's testimony "concerning the intensity, persistence and limiting effects of [her] symptoms [is] not entirely credible." Tr. 20.

**A. Plaintiff's Noncompliance with Medication**

The ALJ noted the record contains numerous references to Plaintiff suffering from hallucinations, psychotic activity, and paranoid ideation, but he found "when [Plaintiff] is

regularly taking her prescribed medication, her symptoms improve." Tr. 22. For example, the ALJ noted Cintia Almonte, MHP, found on September 18, 2012, that Plaintiff "seemed less anxious than in previous sessions" after taking medication regularly. The record, however, reflects one week later on September 24, 2012, Almonte reported Plaintiff left the office "shortly after she arrived" because she was "feeling paranoid." Tr. 430. Almonte noted Plaintiff "presents with high levels of anxiety." Tr. 430.

Similarly, the ALJ noted Plaintiff stopped taking her medications in November and December 2012 and her condition deteriorated, but her condition improved when she began taking her medication regularly. The record, however, reflects Plaintiff continued to experience paranoia and had "taunting thoughts," "auditory hallucinations," anxiety, suicidal thoughts, and visual hallucinations at least from January through March 2013 when she was receiving mental-health treatment and medication. Tr. 407, 411, 414, 416. For example, on March 26, 2013, Plaintiff presented as "overwhelmed and in distressed [*sic*], she was tearful and appeared anxious and depressed." Tr. 402. In June 2013 Plaintiff stated she was taking her medications daily, but she "is not doing any better." Tr. 474. In addition, the record reflects Plaintiff was

homeless on at least two occasions when she was off of her medications and that she may not be capable of appreciating the importance of being on medications at all times.

Plaintiff asserts the ALJ failed to follow the protocol set out in 42 C.F.R. § 416.930 and Social Security Ruling 82-59 that is required for an ALJ to determine a claimant's noncompliance with medication. Specifically, § 416.930 provides:

(a) What treatment you must follow. In order to get benefits, you must follow treatment prescribed by your medical source(s) if this treatment is expected to restore your ability to work.

(b) When you do not follow prescribed treatment. If you do not follow the prescribed treatment without a good reason, we will not find you disabled.

\* \* \*

(c) Acceptable reasons for failure to follow prescribed treatment. We will consider your physical, mental, educational, and linguistic limitations (including any lack of facility with the English language) when determining if you have an acceptable reason for failure to follow prescribed treatment.

SSR 82-59 further explains:

SSA may make a determination that an individual has failed to follow prescribed treatment only where all of the following conditions exist:

1. The evidence establishes that the individual's impairment precludes engaging in any substantial

gainful activity (SGA) or, in the case of a disabled widow(er) that the impairment meets or equals the Listing of Impairments in Appendix 1 of Regulations No. 4, Subpart P; and

2. The impairment has lasted or is expected to last for 12 continuous months from onset of disability or is expected to result in death; and

3. Treatment which is clearly expected to restore capacity to engage in any SGA (or gainful activity, as appropriate) has been prescribed by a treating source; and

4. The evidence of record discloses that there has been refusal to follow prescribed treatment.

Where SSA makes a determination of "failure," a determination must also be made as to whether or not failure to follow prescribed treatment is justifiable.

\* \* \*

Where the treating source has prescribed treatment clearly expected to restore ability to engage in any SGA (or gainful activity, as appropriate), but the disabled individual is not undergoing such treatment, appropriate development must be made to resolve whether the claimant or beneficiary is justifiably failing to undergo the treatment prescribed.

*Development With the Claimant or Beneficiary*--The claimant or beneficiary should be given an opportunity to fully express the specific reason(s) for not following the prescribed treatment. Detailed questioning may be needed to identify and clarify the essential factors of refusal.

The record must reflect as clearly and accurately as possible the claimant's or beneficiary's reason(s) for failing to follow the prescribed treatment.

Individuals should be asked to describe whether they understand the nature of the treatment and the probable course of the medical condition (prognosis) with and without the treatment prescribed. The individuals should be encouraged to express in their own words why the recommended treatment has not been followed. They should be made aware that the information supplied will be used in deciding the disability claim and that, because of the requirements of the law, continued failure to follow prescribed treatment without good reason can result in denial or termination of benefits.

\* \* \*

*Development With Treatment Source*--After documenting the claimant's or beneficiary's statements concerning the refusal of treatment, it may be necessary to recontact the treating source to substantiate or clarify what the individual was told. If possible such contacts should be made by the DDS staff physician.

SSR 82-59, at \*2-\*3 (emphasis in original).

The record does not reflect the ALJ asked Plaintiff to "express the specific reason(s) for not following the prescribed treatment," did not engage in detailed questioning in an effort to identify and to clarify the "essential factors" of Plaintiff's failure to remain on medication, and did not ask Plaintiff whether she understood the nature of her treatment and her prognosis with and without the prescribed treatment. It also does not appear Plaintiff was made aware "that, because of the requirements of the law, continued failure to follow

prescribed treatment without good reason can result in denial or termination of benefits." In addition, the ALJ does not point to any treating or examining medical professional who opined Plaintiff would be able to work on a regular and continuing basis if she followed her treatment program. For example, Dr. Brischetto, examining psychologist, noted in October 2014 that Plaintiff "needs ongoing mental health evaluation and consultation to manage her symptoms. Her prognosis at this time is very guarded with her current psychotropic medication regime." Tr. 548. At best, Dr. Brischetto opined Plaintiff's symptoms "*could* improve with continued management." Tr. 548 (emphasis added).

Courts have held it is error for an ALJ not to follow the requirements of SSR 82-59 when rejecting a claimant's testimony based on the claimant's failure to follow prescribed treatment. See, e.g., *James R. v. Comm'r Soc. Sec.*, No. 2:17-cv-00297-MKD, 2019 WL 267880, at \*5 (E.D. Wa. Jan. 18, 2019) ("[T]he ALJ must consider the claimant's offered good cause for failing to follow the recommended treatment. SSR 82-59."); *Leslee C. v. Berryhill*, 2019 WL 130298, at \*4 (W.D. Wa. Jan. 8, 2019) ("[B]efore finding inconsistency [in the plaintiff's testimony] on [the basis of the plaintiff's failure to follow treatment], the ALJ must consider possible reasons for a failure



to comply with or seek treatment, such as an inability to afford treatment or side effects less tolerable than symptoms.").

#### **B. Plaintiff's Work History**

The ALJ also rejected Plaintiff's testimony in part on the ground that she provided inconsistent reports of her work history. Specifically, the ALJ noted Plaintiff reported in November 2011 that she had not worked since 1999. The ALJ, however, points to a report by the Cooperative Disability Investigations Unit (CDIU) in which the investigator reported an unidentified witness provided the investigator with a proof-of-employment verification letter that Plaintiff provided to the witness on signing the lease for Plaintiff's apartment.

Tr. 532. According to the CDIU report,

[t]he letter was dated June 13, 2011 from Macedonia Baptist Church (MBC) Operation Hope. The letter was typewritten on MBC letterhead basically stating [Plaintiff] has been employed with them since 5/2011 on a part-time basis and works 20 hours a week, attaining a salary of \$840 a month.

Tr. 532. Plaintiff, however, points out that when the investigator attempted to verify this information, he found the telephone number listed on the letter was no longer a working number, one of the addresses listed on the letter was no longer an MBC, and the other address on the letterhead had limited hours and no one responded to the investigator's attempts to

contact the occupant. Tr. 532. In addition, Plaintiff's earnings record reflects only self-employment earnings of \$2,124 for 2011 and \$1,416 for 2012, which does not support the allegation that Plaintiff was employed at MBC and/or earned \$840 per week for a year. Tr. 213. Moreover, Plaintiff does not remember being self-employed. The Social Security Administration noted it made several attempts to determine whether Plaintiff was employed during 2011 and 2012, but it was unsuccessful. Tr. 214-17. In addition, Plaintiff notes she has not been provided with copies of the material allegedly given to the investigator that indicated Plaintiff was employed by MBC. The Court concludes this record does not support a finding that Plaintiff failed to report her work for MBC.

In summary, the Court concludes on this record that the ALJ erred when he partially rejected Plaintiff's testimony because he did not provide clear and convincing reasons supported by substantial evidence in the record for doing so.

## **II. Examining Psychologists' Opinions**

Plaintiff asserts the ALJ erred when he gave little weight to the opinions of Drs. Cline and Brischetto, examining psychologists.

An ALJ may reject an examining physician's opinion when it is inconsistent with the opinions of other treating or examining

physicians if the ALJ makes "findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002). When the medical opinion of an examining physician is uncontroverted, however, the ALJ must give "clear and convincing reasons" for rejecting it. *Thomas*, 278 F.3d at 957. See also *Lester v. Chater*, 81 F.3d 821, 830-32 (9<sup>th</sup> Cir. 1996).

**A. Dr. Cline's Opinion**

Dr. Cline conducted a psychological evaluation of Plaintiff on September 21, 2011. Dr. Cline diagnosed Plaintiff with major depressive disorder, panic disorder, and a learning disability. Dr. Cline opined Plaintiff's emotional lability, "anger dyscontrol," and depressed mood would have a moderate to marked affect on Plaintiff's ability to work. Tr. 333. Dr. Cline found Plaintiff was markedly limited in her ability to understand, to remember, and to "persist in tasks by following complex instructions of three or more steps"; to learn new tasks; and to communicate and to perform effectively in a work setting with even limited public contact. Tr. 335. Dr. Cline found Plaintiff was moderately limited in her ability to perform routine tasks "without undue supervision," to be aware of normal hazards and to take appropriate precautions, and to maintain

appropriate work behavior. Tr. 335. Dr. Cline concluded Plaintiff's

current constellation of symptoms appears quite severe. . . . Thus she would likely benefit greatly from a psychiatric assessment and medication trials. She will also need assistance in succeeding in employment. . . . She currently has problems with ADL's [sic] including self-care, shopping and preparing food, and with social interactions.

Tr. 335.

The ALJ gave little weight to Dr. Cline's opinion on the grounds that it "is inconsistent with [Plaintiff's] actual performance of work activity at that time" and it predates the revised relevant period. Tr. 27. As noted, the Court has concluded the record does not support the ALJ's finding that Plaintiff actually performed "work activity" during the time Dr. Cline conducted her evaluation.

The Ninth Circuit, however, has held "[m]edical opinions that predate the alleged onset of disability are of limited relevance." *Carmickle v. Comm'r*, 533 F.3d 1155, 1165 (9<sup>th</sup> Cir. 2008) (citing *Fair v. Bowen*, 885 F.2d 597, 600 (9<sup>th</sup> Cir. 1989)). See also *Warzecha v. Berryhill*, 692 F. App'x 859, 860 (9<sup>th</sup> Cir. 2017) (same). "However, it is clear from [Ninth Circuit] precedent and the Social Security Regulations that 'the ALJ must consider all medical opinion evidence.'" *Williams v.*

*Astrue*, 493 F. App'x 866, 868 (9<sup>th</sup> Cir. 2012) (quoting *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9<sup>th</sup> Cir.2008)).

As noted, Plaintiff alleged disability beginning in 1999, but the ALJ limited the relevant period to after November 2, 2012, based on Plaintiff's earlier SSI application that was denied. The ALJ considered Dr. Cline's opinion as required by the Ninth Circuit, but he found it was of limited relevance because it predated the relevant period as permitted by the Ninth Circuit.

Accordingly, the Court concludes on this record that the ALJ did not err when he gave limited weight to Dr. Cline's opinion because he provided clear and convincing reasons supported by substantial evidence in the record for doing so.

**B. Dr. Brischetto's Opinion**

On October 10, 2014, Dr. Brischetto conducted a psychodiagnostic examination of Plaintiff. Dr. Brischetto noted Plaintiff was "very anxious and paranoid[,] . . . yelled profanities and obscenities several times . . . reportedly in response to her voices[,] . . . and appeared to have difficulty focusing on the mental status tasks." Tr. 547. Dr. Brischetto noted Plaintiff's "thought content was significant for paranoia and auditory hallucinations[,] . . . her mental tracking did not

appear to be good[, and] . . . her mental persistence appeared limited." Tr. 547. Plaintiff advised Dr. Brischetto that she was on antipsychotic medications and seeing a counselor, but she did not believe her medications were working sufficiently.

Dr. Brischetto stated Plaintiff "needs ongoing mental health evaluation and consultation to manage her symptoms. Her prognosis . . . is very guarded with her current psychotropic medication regime." Tr. 548. Dr. Brischetto expressed "some concern" about Plaintiff's possible noncompliance with taking her medications and stated Plaintiff's symptoms "could improve with continued management." Tr. 548. Dr. Brischetto concluded Plaintiff's

insight and judgment appeared limited. She has difficulty with socialization. She has some symptoms of agoraphobia. She is paranoid. She appeared to be responding to internal distractors in the form of hallucinations during the session. She would have severe difficulty at this point maintaining attention and concentration in a work setting. She would have significant difficulties with social interaction and adapting to a work environment.

Tr. 549.

The ALJ gave little weight to Dr. Brischetto's opinion on the ground that Dr. Brischetto "fail[ed] to take into account [Plaintiff's] noncompliance with her prescribed medication regimen, as well as her improvement with consistent and

appropriate treatment, on her ability to perform work activities." Tr. 26.

As noted, the ALJ did not inquire of Plaintiff why she occasionally failed to take her medication. The Ninth Circuit has "particularly criticized the use of a lack of treatment to reject mental complaints both because mental illness is notoriously underreported and because 'it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation.'"

*Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1299-300 (9<sup>th</sup> Cir. 1999) (quoting *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9<sup>th</sup> Cir. 1996)). The record also does not reflect any treating or examining medical professional stated Plaintiff would be able to work on a regular and continuing basis if she followed her treatment program.

In addition, as noted, although the record reflects Plaintiff improved at times when taking medication regularly, the record also reflects times when Plaintiff was taking her medication and still suffered from serious mental-health issues that could impede her ability to work.

On this record the Court concludes the ALJ erred when he gave limited weight to Dr. Brischetto's opinion because he did not provide clear and convincing reasons supported by

substantial evidence in the record for doing so.

**III. The ALJ failed to include all of Plaintiff's limitations in his hypothetical to the VE.**

Plaintiff alleges the ALJ erred when he failed to include all of Plaintiff's limitations in his hypothetical to the VE. Specifically, Plaintiff alleges the ALJ failed to include limitations identified by Plaintiff in her testimony and by Drs. Cline and Brischetto in their opinions.

As noted, at Step Five the Commissioner must show the claimant can do other work that exists in the national economy. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995). The Commissioner can satisfy this burden by eliciting the testimony of a VE with a hypothetical question that sets forth all of the limitations of the claimant. *Id.* The hypothetical posed to a VE must include those limitations supported by substantial evidence in the record. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 883, 866 (9<sup>th</sup> Cir. 2006).

The Court has already concluded the ALJ erred when he rejected some of the limitations asserted by Plaintiff and Dr. Brischetto. On this record, therefore, the Court also concludes ALJ erred when he did not include those limitations in his hypothetical to the VE.



#### IV. Remand

The decision whether to remand for further proceedings or for immediate payment of benefits generally turns on the likely utility of further proceedings. *Harman v. Apfel*, 211 F.3d 1172, 1179 (9<sup>th</sup> Cir. 2000). The court may "direct an award of benefits where the record has been fully developed and where further administrative proceedings would serve no useful purpose." *Smolen*, 80 F.3d at 1292.

The Ninth Circuit has established a three-part test "for determining when evidence should be credited and an immediate award of benefits directed." *Harman*, 211 F.3d at 1178. The court should grant an immediate award of benefits when

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

*Id.* The second and third prongs of the test often merge into a single question: Whether the ALJ would have to award benefits if the case were remanded for further proceedings. *Id.* at 1178 n.2.

On this record the Court concludes further proceedings are required because it is necessary for the ALJ to determine why

Plaintiff failed to take her medications and whether any treating or examining medical professional found Plaintiff would be able to engage in substantial gainful activity if she followed her treatment program. In addition, if the ALJ concludes Plaintiff has established sufficient reasons for her failure to maintain her treatment regimen, the ALJ must consider Plaintiff's relevant limitations as assessed by Dr. Brischetto and asserted by Plaintiff.

#### **CONCLUSION**

For these reasons, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 28 U.S.C. § 405(g) for further proceedings consistent with this Opinion and Order.

IT IS SO ORDERED.

DATED this 19<sup>th</sup> day of February, 2019.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States Senior District Judge